IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL WRIT No. 2593 of 2007

GOPAL AGARWAL
V/S
SMT. KANTA DEVI & ORS.

Mr. BS CHARAN, for the appellant / petitioner

Mr. VIVEK SHRIMALI, for the respondent

Date of Order : 25.5.2007

HON'BLE SHRI N P GUPTA,J.

ORDER

The petitioner seeks to challenge the judgment Annex.3 dated 13.3.2007, passed by the Appellate Rent Tribunal, whereby he had set aside the judgment of the Rent Control Tribunal Annex.1, and had decreed the petition for eviction on the ground of default in payment of rent.

The facts of the case are, that the respondent No.1 Gopal, hereafter to be referred to as the respondent, filed a petition for eviction from the residential premises, which were in the tenancy of the petitioner at a monthly rent of Rs.3750/-. His case in the eviction petition is, that the premises were taken on rent by the present petitioner, wherein his wife used to reside, however she expired in 1983-84, and thereafter, the

petitioner continues to be tenant. It is then alleged that the rent was neither paid nor tendered from 1.3.2003 to 31.8.2003 and notice was served on the tenant, which was received on 14.7.2003, wherein rent was demanded from 1.3.2003 to the tune of Rs.15,000/- per month, and future monthly rent was directed to be deposited in the landlord's saving bank account No.4020 of Canara Bank, Seth ji ki Bari, Udaipur. It was alleged that the tenant deposited two months' rent on 16.8.2003 i.e. after expiry of 30 days of the notice and one month's rent was deposited on 28.8.2003, which is not a valid deposit and thus, eviction was sought on the ground of default. The tenant admitted the rented premises to be on rent at Rs.3750/-, and it was alleged that the rent upto 31.10.2003 has been deposited in the saving bank account of the landlord in ICICI Bank, Branch Udaipur, and receipt of notice was admitted to have been received on 14.7.2003. It was denied that four months' rent was due, rather one month's advance rent was with the landlord, and monthly rent was payable by 15th of day of succeeding month, and as the notice dated 4.7.2003 was received on 14.7.2003, rent for previous month was not due, as such only two months' rent was due, and that no valid notice under Section 5 or 9 has been given. It was also pleaded that the earlier suit for eviction of the same premises is also pending. The learned Tribunal vide judgment dated 24.5.2004 Annex.1 dismissed the petition on the ground, that admittedly notice was sent on 4.7.2003,

which was received on 14.7.2003, while rent upto 31.10.2003 has been deposited in ICICI Bank, and that according to Section 9(a), no petition for eviction can be filed unless notice is sent by registered post, and the tenant does not make payment within the period of 30 days from the service of notice, and that according to Section 5, in absence of contract to the contrary the tenant shall pay rent of a particular month by 15th of next succeeding month, and there is no material on record to show, as to when the rent was agreed to be paid, therefore, it was consequent that the rent would be payable by 15th of next succeeding month, while notice has been given on 4.7.2003, which included rent for the month of June 2003, which was become payable on 14.7.2003, and if the month of June 2003 is excluded, as on the date of notice only 3 months' rent was in arrears, and as is clear from Ex.A/3, the two months' rent has been deposited on 16.8.2003, and as the subsequent rent was deposited, it cannot be said that any valid notice was served, nor can it be said, that the tenant has committed any default. In appeal, the learned Appellate Tribunal found, that it is not correct, that while giving notice four months' rent was not due, inasmuch as, according to Section 5(1) rent could be paid within 15 days of next succeeding month, but then, thereby it cannot be said that rent becomes payable after expiry of 15 days, rather rent becomes payable on completion of the month, and the tenant can pay rent upto 15th day of next month, but thereby it

cannot be said that the rent would not become payable till 15th of the next succeeding month, and therefore, four months' rent was clearly outstanding, and was rightly claimed, and since the rent has not been paid within 30 days of the receipt of notice, which period expired on 13.8.2003, the tenant was found to be defaulter, the appeal was allowed and the trial Court's judgment was set aside, and the order of eviction was passed.

Assailing this judgment, multifarious arguments were raised, including reiterating, that by virtue of Section 5(1), rent could be paid upto 15th of July 2003, therefore, the notice dated 4.7.2003 could not include the rent for June 2003, and therefore, there was no default for a period of four months. Then an argument was raised that since by virtue of Section 3(iii) of the Act, the Act is not applicable to premises, which are on rent at a monthly rent exceeding Rs.4000/-, and since by virtue of the permissible increase of rent, when the appeal was pending before the Appellate Tribunal, the monthly rent stood increased, and exceeded Rs.4000/-, and therefore, since the appeal is continuation of suit, rather the proceeding of the trial Court merges into the appellate proceedings, and therefore, as soon as the rent exceeded Rs.4000/-, in view of the provisions of Section 3(iii) the Act, the Act no more remains applicable to such premises, and therefore, the Appellate Court should have dismissed the petition, on

the ground of the Tribunal having no jurisdiction to entertain the proceedings. The next submission made is, that the Act is not retrospective, and since the Act came into force on 1.4.2003, the petitioner could not be held as defaulter, on account of non-payment of rent for the month of March 2003, which is for a period anterior to the commencement of the Act. Then it was contended, that since on 16th August 2003 the rent of two months had been paid, while 15.7.2003 was holiday, being Independence Day, and therefore, the petitioner could not be held to be defaulter. The next argument made is, that it has clearly been pleaded, that one month's rent was already lying in advance with the landlord, and therefore also, he could not be held to be defaulter. Then referring to Annex.2, it was contended, that before filing the present petition for eviction, the landlord had already filed a suit for eviction, being suit No.28/2006, which was filed on 1.7.2002, for eviction on the ground of bonafide necessity as well as default etc., alleging the rent to have been paid only upto 31.5.2002, and claiming rent from 1.6.2002, till the date of eviction and on that ground, issue No.2 had been framed therein, comprehending the question, as to whether the plaintiff is entitled to a sum of Rs.3750/- per month from 1.6.2002 till eviction by way of damages for use and occupation, and vide Annex.2 dated 19.1.2007, the plaintiff had been so held entitled. With these facts, it was contended, that since the landlord's claim for rent for

the period since 1.6.2002 was already sub-judice in said suit No.26/06, he could not maintain the present suit, unless he had taken resort to the provisions of Section 32 of the Act, by withdrawing that suit within the time prescribed, and filing a fresh suit; that having not been done, the present suit could not be maintained. It was also contended, that in any case since during pendency of the appeal against Annex.1, judgment Annex.2 had come to be passed, holding the landlord to be entitled to rent as above, it operated as res-judicata, and therefore, the appeal was required to be dismissed on that count itself. The next submission made is, that in the present case, no notice was given under Section 5(4) of the Act, and that having not been given, the petition for eviction could not be maintained by virtue of the provisions of Ist Proviso to Section 9(a), and therefore also, the order for eviction could not be passed.

On the other hand, learned counsel for the landlord relied upon the judgment of Hon'ble Supreme Court, in Har Charan Singh Vs. Shiv Rani, reported in AIR 1981 SC 1284, specially para-24 thereof, to contend, that when the rent is payable every month, the rent becomes due at the end of every month, as soon as the month is over, and failure on the part of the tenant to pay the same would dub him as defaulter for arrears of rent for one month, and if this process goes on, meaning thereby that period of four

months having expired, for each of the four months the rent when it becomes due, and payable, was not paid, even then it could be said, that the tenant is in arrears of rent for not less than four months. Then reliance was placed on judgment of this Court, in Ganpatlal Vs. Kuldeep Singh reported in 1989(1) RLW 1, wherein this precise controversy was adjudicated by this Court in para-14, and it was held, that the rent for a particular month becomes due as soon as the month ends, and it is a different matter, that as per provisions of the Act, it is made payable by 15th of the next following month, but that is only a facility provided to the tenant to pay the rent by that date, but that does not mean that the rent has not become due for that month with the end of the month. It was pointed out that this judgment has been affirmed by the Division Bench in appeal, and vide judgment reported in AIR 1996 SC 729, the appeal against this judgment has been dismissed by the Hon'ble Supreme Court as well, and therefore, the only conclusion is, that as on the date of serving of the notice dated 4.7.2003, the rent for four months was in arrears, within the meaning of Section 9(a). Then it was contended that the arguments of merger, and jurisdiction, and res-judicata etc., are all misplaced, and have no legal basis. It was submitted, that in the notice Ex.2, the petitioner was clearly informed about the bank account number which is located within the local municipal limits, and therefore, this is sufficient compliance with the provisions of the

Act, and when admittedly the defendant had been depositing the rent for the previous period, and has already deposited even for the subsequent period, and part of the period covered by notice, in the petitioner's bank account, it is not open to the petitioner to raise such contentions.

I have considered the submissions, and the judgments cited by learned counsel for the respondent, and various provisions of the Act, as pointed out by learned counsel for the petitioner.

Taking up the main contention about the defendant being not in arrears for a period of four months, admittedly, the notice was given, pointing out the rent from 1.3.2003 to 30th June 2003 to be outstanding, and this notice was received on 14.7.2003. In my view, in view of the judgment of Hon'ble the Supreme Court, in Har Charan Singh's case, and that of this Court in Ganpatlal's case, it cannot be accepted, that the rent did not become payable, even as on the date when the notice was received by the petitioner, rather the rent had become payable with the end of the month of June itself, of course, it could be paid within 15 days, but that was only a facility available to the petitioner, which has not been availed, rather even after notice, the amount had not been paid. Therefore, I am at one with the findings recorded by the learned lower Appellate Tribunal, about the defendant being in arrears of

four months rent.

So far retrospectivity of the Act is concerned, of course the Act is not retrospective, but then, that does not mean that no action could be taken against the tenant, on account of his non-payment of rent for the month of March 2003, simply because the Act commenced on 1.4.2003. It is not provided in Section 9, that even four months should be comprised of a period after commencement of the Act, therefore, this argument also cannot be accepted. Likewise, the argument made about the ouster of jurisdiction of the Tribunal, on account of increase of rent during pendency of the appeal, so as to exceed Rs.4000/- per month, by virtue of Section 3(iii) of the Act, is simply preposterous. The existence of jurisdiction of the Tribunal is to be considered on the date of filing of the eviction petition, and it cannot be an on going process, so as to entitle the tenant to claim ouster of jurisdiction, simply because the matter happened to remain pending for long time, and during that intervening period, whether before learned trial Court, or even before the Appellate Tribunal, by virtue of the provisions of the Act, the rent may happen to exceed the limits prescribed under Section 3(iii). Thus, this contention also cannot be accepted. Then so far as the contention raised on the anvil of previously instituted suit, being pending, is concerned, of course the previous suit was instituted in July 2002,

and that has been decided vide Annex.2, and in that suit, damages by way of use and occupation have been claimed from 1.6.2002 till actual delivery of possession, and for that the landlord has been held entitled as well, but then on that count, it cannot be said that the landlord was debarred from instituting the present proceedings, or that for instituting present proceedings, the only recourse available to the landlord was to have withdrawn that suit, by taking recourse to the provisions of Section 32. Likewise passing of the judgment Annex.2 cannot be said to have the effect of res-judicata, so as to debar the Appellate Tribunal from passing the judgment Annex.3. It may in addition be observed, that the suit decided vide Annex.2 was not a suit based on default, inasmuch as, by then the rent upto 31.5.2002 had already been paid, and obviously since the suits are known to remain pending for long, the landlord is legitimately entitled to claim mesne profits, till delivery of possession, but then, since the tenant is a statutory tenant, and till the tenancy is terminated in accordance with law, landlord very much remains entitled to the regular payment of rent, and therefore, if the default has been committed in payment of rent, within meaning of relevant statutory provisions, the landlord cannot be debarred from instituting fresh litigation, for eviction, on the ground of default. It may also be observed, that admittedly rent upto period, before 1.3.2003, has already been paid, likewise rent for

subsequent period is also alleged to have been paid, still in the judgment Annex.2, the landlord has been held entitled to mesne profits from 1.6.2002 onwards, but that does not mean, that landlord would be entitled to receive the rent for this interregnum period, over again, despite having it received ones, and therefore, that decree cannot be said to have adjudicated the question of the defendant being defaulter, or not being a defaulter in payment of rent for the period 1.3.2003 to 30th June 2003, and therefore, could not be held as res-judicata at all. The cause of action in the two suits is altogether different, and therefore also, Section 32 was not required to be resorted to.

So far notice under Section 5 is concerned, nothing has come on record, as to whether notice there-under was given or not, but then, the fact does remain, that in the notice, Ex.2, the tenant was called upon to deposit the amount in the landlord's bank account number, given therein, which is located within the area as contemplated by Section 5(4), and that sufficiently complies with the requirements. It could be termed as a composite notice. It is also significant to note, that it is not the case of the tenant, that it is on account of non-compliance of Section 5(4), that he could not pay the rent. The tenant is admittedly in tenancy since 1980, and has admittedly paid rent up-till before 1.3.2003.

In that view of the matter, the argument raised on the anvil of Section 5(4) also has no force.

Thus, considering from any standpoint, I do not find any force in the writ petition. The same is, therefore, dismissed summarily.

(N P GUPTA),J.

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